In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION ET AL., appellants,
v.
CLAIRE FURNACE COMPANY ET AL., appellees.

No. 250.

ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

STATEMENT.

This is an appeal from a judgment of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District of Columbia enjoining the Federal Trade Commission and the members thereof (hereinafter called "the Commission") from requiring the appellees to furnish to the Commission certain reports giving in detail the quantities of finished and semifinished steel

THE FACTS.

In January and February, 1920, the Commission, pursuant to resolution theretofore adopted (Rec. p. 11), sent to the appellees, and to practically all corporations engaged in the production and sale in interstate commerce of finished or semifinished steel products, some of whom were also engaged in the production of coal and coke, blank schedules, which the corporations were requested to fill out and return to the Commission. Their attention was invited to the provisions of the Federal Trade Commission Act which prescribes penalties for failure by corporations to comply with any lawful order of the Commission. Rearranging somewhat the order in which the data were called for on the schedules to conform to our subsequent discussion, these schedules and the accompanying instructions required the appellees to report monthly the following information:

(A) Sales prices at which specified products were sold in the domestic market during the specified month, and the quantity, value, and average realization per ton; and the same information for export shipments. (Rec. pp. 21–22.)

(B) Identical information with respect to contract prices. (Rec. pp. 23–25.)[1]

(C) Copies of the companies' monthly cost sheets showing the cost of producing specified products. (Rec. pp. 18–19.)

[1] For explanation of terms "Sales Prices" and "Contract Prices," see Schedules. (Rec. pp. 20, 23.)

(D) Any depreciation and general administrative and selling expenses not already included in costs (if any such segregation had been made by the companies). (Rec. p. 28.)

(E) The tonnage produced during the month. (Rec. pp. 15–17.)

(F) The capacity for production. (Rec. p. 26.)

(G) Quantities of products for which orders were booked during the month and unfilled orders on hand at the end of the month. (Rec. p. 27.)

(H) Income statement and balance sheet. (Rec. pp. 29–34.)

While the sheets of the schedules devoted to prices and costs list a number of products, it should be understood that none, or but few, of the very large companies make all of such products, and that therefore the reports of a single company would ordinarily include the prices and costs of only a few of the products designated.

In requesting the information respecting costs of producing steel products, the Commission did not differentiate between the costs of producing products moving in interstate commerce and costs of products moving in intrastate commerce. Separate cost records for products moving in interstate and intrastate commerce are not kept. The amended answer alleges that the interstate and intrastate commerce of each of the appellees is conducted as a single, nonseparable whole. (Rec. p. 79.)

basic commodities would, in its opinion, be of the greatest value to the country at large, to Congress, to the courts, to the prosecuting arm of the Government, and to business itself, in ascertaining causes of the conditions existing. Asked what articles or industry should be investigated, the then Chairman of the Commission suggested fuel, steel, and several other basic commodities. (Hearings First Deficiency Appropriations Bill, Fiscal Year 1920, p. 24 et seq.)

Accordingly, the following item was inserted in the Deficiency Appropriation Act, approved November 4, 1919:

> Federal Trade Commission: For all expenses necessary in connection with the collection of information as may be directed by the President of the United States, *or within the scope of its powers*, regarding the production, ownership, manufacture, storage, and distribution of foodstuffs, *or other necessaries*, and the products or by-products arising from or in connection with the preparation and manufacture thereof, *together with figures of cost and wholesale and retail prices*, $150,000.

Pursuant to the wish of Congress expressed in the above law, and acting under the powers which it believed to be conferred upon it by the Federal Trade Commission Act, the Commission, by resolution adopted December 15, 1919 (Rec. p. 11), instituted an inquiry, the first step in which was to require practically all corporations engaged in the manufacture and in the sale in interstate commerce of steel and

coal to make the reports which, in the instant case, the court below holds the Commission can not lawfully require.

Holding of the Courts Below.

The Supreme Court of the District of Columbia held (1) that the power of Congress to regulate the business of corporations engaged in interstate commerce and the exercise of the visitorial power of Congress over the business of such corporations is always limited to information respecting their interstate business; (2) that the information required in the Commission's schedules has to do almost wholly with the manufacturing operations, and with the intrastate commerce of the corporations, over which business Congress does not have jurisdiction; and (3) that Section 6 of the Trade Commission Act does not empower the Commission to require information except as respects the interstate commerce of corporations.

The Court of Appeals of the District of Columbia affirmed the judgment of the Supreme Court, and upon the same general grounds. The opinion of that Court apparently goes further, however, and holds that the regulating power of Congress under the Commerce Clause extends only to transportation of commodities by instrumentalities of commerce, and not to the purchase and sale of commodities between parties in different states.

Detailed Assignment of Errors appears at pp. 129 to 134 of the Record.

The Questions Presented.

The Assignment of Errors raises the following general questions:

(1) Has Congress the power to compel corporations to supply information within the field over which it has power to legislate in order to learn whether remedial laws are required for the national welfare?

(2) Under the Commerce Clause, does the power extend not only to procuring information respecting interstate commerce itself, but also to procuring information respecting intrastate commerce and manufacture, where such information will reveal whether the law of supply and demand is operating in interstate commerce, or whether such commerce is being unduly burdened.

(3) As a means of procuring information which Congress may itself require, may it constitutionally confer upon an administrative body authority to compel corporations to supply information, by resort to the courts, if necessary, respecting a subject over which it has jurisdiction (1) for transmission to Congress; and (2) as a basis of reports to Congress and of recommendations to Congress for legislation by such administrative body.

(4) As an incident to its power to regulate interstate commerce, may Congress constitutionally authorize an administrative body to ascertain and publish the facts respecting the conduct, organization, management, business, and practices of corporations engaged in interstate commerce?

(5) Was the Commission's demand for the reports a Constitutional exercise of the visitorial power of the Federal Government over corporations engaged in interstate commerce?

(6) Does the Federal Trade Commission Act authorize the Commission to require the production of the information called for in the schedules?

(7) If the statute, properly construed, requires the corporations to furnish the information, is it unconstitutional as authorizing unreasonable searches and seizures within the Fourth Amendment to the Federal Constitution, or as depriving the corporations of property without due process of law within the Fifth Amendment to that instrument?

History of the Times in Which Congress Created the Trade Commission.

As this suit brings the constitutionality and construction of portions of Sections 6, 9 and 10 of the Federal Trade Commission Act for the first time before this court, a review of the times in which the legislation was enacted, as throwing light upon the Congressional purpose, becomes material and, we believe, helpful.

For several years prior to the creation of the Commission consideration had been given, both in Congress and by the public, to the establishment of a commission with powers over industrial corporations engaged in interstate commerce. Exhaustive hearings had been conducted in 1911-12, under Senate Resolution 98 (62d Congress, 2d session), and as a result the appropriate committee reported that the creation of a trade commission might be

helpful in the administration and enforcement of the antitrust law. (Senate Report 597, 63d Congress, 2d session). The platform of the great political parties for 1912 declared for the creation of such a commission. President Wilson's Message to Congress of January 20, 1914, contained the following:

> And the business men of the country desire something more than the menace of legal process in these matters be made explicit and intelligible. They desire the advise, the definite guidance, and information which can be supplied by an administrative body, an interstate trade commission.
>
> The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

As a result presumably of the extended consideration previously given to the question, and of the President's recommendation, the proper committees of both houses of Congress took up in 1913 the consideration and drafting of measures for the creation of a trade commission, and the present law was enacted.

Previous Legislation.

There had been in existence since 1903, first in the Department of Commerce and Labor and later in the Department of Commerce, the Bureau of Corporations. The principal provisions of the Act creating that Bureau were as follows:

> SEC. 6. * * *
>
> The said commissioner (of corporations) shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several States and with foreign nations, excepting common carriers subject to "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public.

The purpose of the Congress in 1914 appears to have been materially to enlarge the powers of the Bureau of Corporations by including the power to require annual and special reports of corporations

(paragraph 6)[1] and "compulsory publicity" thereof (paragraph 35), to make investigations at the request of the President or either House of Congress and "report the facts relative to any alleged violation of the antitrust acts" (paragraph 20), to make recommendations for legislation "only after the most exhaustive investigation by trained experts" (paragraphs 34–35), to make recommendations for the readjustment of business of corporations found by the courts to be in violation of the antitrust laws (paragraphs 26–27), and to place the exercise of these powers in the hands of a bipartisan commission "removed entirely from the control of the President and the Secretary of Commerce," with power to make public the information obtained in its own discretion (paragraph 11).

Provisions of the Trade Commission Act Directly Involved in this Suit.

This suit involves primarily certain provisions of Sections 6, 9, and 10 of the Trade Commission Act. These provisions are as follows:

> SEC. 6. That the commission shall also have power—
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate com-

[1] The paragraph numbers in this paragraph of the text have reference to numbers in Appendix A, House Report No. 533, 63d Congress, 2d session.

merce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

* * * * *

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

* * * * *

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit there-

with recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

* * * * *

SEC. 9. Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

SEC. 10. * * *

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Broadly stated, the above provisions authorize the Commission to ascertain the facts respecting the organization, conduct, management, and business of corporations engaged in interstate commerce, either by investigation or by requiring annual or special reports from such corporations, or by both of these methods, to report the facts so gathered to Congress by means of annual or special reports, to publish the facts as it may deem expedient in the public interest, and to make, on the basis of the information so gathered, and from the knowledge gained by experience, recommendations to Congress for additional legislation respecting interstate commerce.

Was it competent for Congress to create the Commission and confer upon it these powers as sought to be exercised in the instant case?

ARGUMENT.

I.

Congress Has Power to Compel the Giving of Information and Production of Documents in Any Inquiry Concerning a Subject Matter Over Which it Has Jurisdiction to Legislate.

The Commission contends that Congress has power to compel witnesses to appear and testify concerning, and to produce books, papers, and documents relating to, any subject over which it has legislative jurisdiction. This power exists not as an aid in detecting breaches of existing law, but as an auxiliary to the exercise of the legislative function.

1. The Constitution Conferred All Powers Proper for the Exercise of Each Power Expressly Granted.

Article I, Section 1, of the Constitution provides that—

> * * * the legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

By Section 8 of the same article it is provided that the Congress shall have power—

> to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

By these two provisions the framers of the Constitution created a legislative body and conferred upon it jurisdiction to make all laws concerning the specific subjects committed to it. A glance at the provisions of the first six sections of Article I of the Constitution reveals that no attempt is made in that instrument to enumerate all and every of the things which this body may do. It is manifest that the framers of the Constitution intended to create a legislative body such as they were familiar with from experience or from history which would have the powers, in the limited field committed to it, which such legislative bodies had within their knowledge exercised in the past.

No principle of constitutional law is more firmly established than that the grant of express power

carries with it by necessary implication all powers necessary or proper for the effective exercise of the powers expressly granted.

In the great case of *McCulloch* v. *Maryland* (4 Wheat. 315) this court held that an express grant of power carries with it the right to employ any means appropriate to the execution of the power. This doctrine has been repeatedly affirmed by this court. In the *Legal Tender Cases* (110 U. S. 421, 440), this court said:

> By the settled construction and the only reasonable interpretation of this clause the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

And again (*Legal Tender Cases*, 12 Wall. 457, 536):

> Indeed the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specifically given, but equally true when

the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. * * *

This is enough to show how, from the earliest period of our existence as a nation, the powers conferred by the Constitution have been construed by Congress and by this court whenever such action by Congress has been called in question. Happily the true meaning of the clause authorizing the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon Congress, and all other powers vested in the Government of the United States or in any of its departments or officers, has long since been settled. In *Fisher* v. *Blight* (2 Cranch, 358) this court, speaking by Chief Justice Marshall, said that in construing it "it would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose it might be said with respect to each that it was not necessary, because the end might be obtained by other means. Congress," said this court, "must possess the choice of means and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution."

2. Among Powers so Granted is that to Acquire Information.

Among the implied powers conferred by the sections quoted is, we contend, the power to acquire information, and to this end to compel the attendance and testimony of witnesses and the production of documentary evidence respecting any subject concerning which it may legislate, in order that legislation thereon may be intelligent, effective, and within the Constitution. Comprehensive and detailed information respecting any subject committed to Congress by the Constitution serves not only to insure the effectiveness of such legislation as may be enacted but may serve to show as well the desirability of not legislating in certain respects or of not legislating at all. The passage of ill-advised legislation, enacted upon incomplete information, especially on the complex questions involved in the regulation of interstate commerce and on matters of taxation, may be avoided if Congress have before it complete information respecting the subject matter; and wise, just, and proper legislation be enacted with such information as a basis of action.

In *Interstate Commerce Commission* v. *Brimson* (154 U. S. 447, 476), this court said:

> We have before us an act of Congress authorizing the Interstate Commerce Commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it

> to be applicable to a matter that may be legally entrusted to an administrative body for investigation—is, we repeat, not disputed and is beyond dispute. Upon everyone, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed in conformity with the Constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon anyone summoned by that body to appear and to testify the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents the duty of producing them if the testimony sought, and the books, papers, etc., called for, *relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion.*[1]

In *Smith* v. *Interstate Commerce Commission* (245 U. S. 33) this court appears fairly to have determined, in a final and conclusive manner, that Con-

[1] All italics in quotations from decisions of the courts are ours unless otherwise stated.

gress has power to compel the testimony of witnesses and the production of documents in an inquiry concerning interstate commerce, and that no question of a violation of existing law need be involved in order that compulsory power may be lawfully employed.

In that case the Interstate Commerce Commission had instituted an investigation in response to a resolution of the United States Senate directing it to investigate and to report to the Senate what amount, if any, the Louisville & Nashville Railroad and certain other railroads had subscribed or expended or contributed for the purpose of preventing other railroads from entering any of the territories served by any of such railroads, for maintaining political or legislative agents, for creating sentiment in favor of any of the plans of any of said railroads, and to ascertain and report as well the relation of the railroads named to one another, the control, if any, exercised by the Louisville & Nashville over the others by stock ownership, leases, or arrangements, and whether, but for these, the railroads would be competitive, and whether through such means rates were fixed and maintained. The questions to which answers were refused by the plaintiff Smith were limited to expenditures or contributions by the company for political campaign purposes, and for the purpose of preventing rate reductions in Alabama, and if such expenditures had been made how they were charged in the accounts of the railroad company. The railroad company con-

tended that the powers of the Interstate Commerce Commission were limited practically to the enforcement of the Act to Regulate Commerce, and that the act did not attempt to regulate the political activities of common carriers or the subject of their endeavoring to exclude competitors from their territory. The court held (at p. 42) that the appellant should be required to answer the questions:

> The Interstate Commerce Act confers upon the Commission powers of investigation in very broad language and this court has refused by construction to limit it so far as the business of the carriers is concerned and their relation to the public. And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public. * * * By Sec. 12 it is authorized to inquire into the management of the business of carriers and keep itself informed as to the manner and method in which the same is conducted, and has the right to obtain from the carriers full and complete information. It may (Sec. 13) institute an inquiry of its own motion, and may (Sec. 20) require detailed accounts of all the expenditures and revenues of carriers and a complete exhibit of their financial operations and prescribe the forms of accounts, records, and memoranda to be kept. And *it is required to report to Congress all data collected by it.*

> It would seem to be an idle work to point out the complete comprehensiveness of the language of these sections, and we are not disposed to spend any time to argue that it necessarily includes the power to inquire into expenditures and their proper assignment in the accounts, and the questions under review, we have seen, go no farther. They are incidental to an investigation as to the "manner and method" (Sec. 12) in which the business of the carriers is conducted; they are in requisition of a detailed account of their expenditures and revenues and an exhibit of their financial operations (Sec. 20), and the answers to them may be valuable as information to Congress (Sec. 21). 245 U. S. at pp. 42, 43, 44.

To the contention that the Commission could only require information "as to any matter or thing concerning which a complaint is authorized to be made, * * * or concerning which any question may rise under any of the provisions of the Act," in support of which the decision in *Harriman* v. *Interstate Commerce Commission* (211 U. S. 407) was cited, the court said, at page 44, in part:

> To sustain it appellant seems to urge that there must be put into words by some complainant or by the Commission, if it move of itself, some definite charge of evil or abuse, and put into expression some definite remedy, and that an inquiry must not transcend either charge or remedy. To so transcend, appellant urges, would be an exercise of autocratic power and is condemned in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407.

> Appellant presses that case beyond its principle. And we may observe that Sec. 13 has been amended and broadened since the decision of that case. The inquiry in the present case is more immediate to the function of the Commission than the inquiry in that and comes within *Interstate Commerce Commission* v. *Chicago, R. I. & Pac. Ry.* * * * (Id. pp. 44, 45.)

To the contention that the questions relating to expenditure of money in Alabama in the campaign against rate reductions did not fall either within the Commission's powers under the statute or within the terms of the Senate Resolution, the court said, at page 46, in part:

> Abstractedly speaking, we are not disposed to say that a carrier may not attempt to mould or enlighten public opinion, but we are quite clear that its conduct and the expenditures of its funds are open to inquiry. If it may not rest inactive and suffer injustice, it may not on the other hand use its funds and its power in opposition to the policies of government. Beyond this generality it is not necessary to go. The questions in the case are not of broad extent. They are quite special, and we regard them, as the learned judge of the court below regarded them, as but incident to the amount of expenditures and to the manner of their charge upon the books of the companies. This, we repeat, is within the power of the Commission. The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any

> way affect their relation to the public. We can not assume that an investigation will be instituted or conducted for any other purpose or in mere wanton meddling. (Id. p. 46.)

The power of Congress to require the production of information respecting subjects committed to its jurisdiction other than interstate commerce has been recognized and upheld by this court. In the case of *In re Chapman* (166 U. S. 661) this court held valid a law of Congress making it a criminal offense for any person, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully to default or refuse to testify upon any question pertaining to the matters under inquiry. The court was of opinion that where the subject matter was within the jurisdiction of the two Houses and the information demanded was pertinent to the subject it was competent for Congress to demand it.

The doctrine announced by the state courts and commentators, by the great weight of authority, is that legislatures have the constitutional power to compel testimony and the production of documents by corporations in inquiries looking to the enactment of legislation.

In *McDonald* v. *Keeler* (99 N. Y. 463) the court said:

> (481) The power of obtaining information for the purpose of framing laws to meet sup-

posed or apprehended evils is one which has from time immemorial been deemed necessary and has been exercised by legislative bodies.

* * * * *

(482) It is difficult to conceive any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and to summon witnesses. In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation, and the remedy required, and, irrespective of the question whether in the absence of a statute to that effect either house would have the power to imprison a recusant witness, I can not yield to the claim that a statute authorizing it to enforce its process in that manner is in excess of the legislative power. * * *

These views are supported by the decision of this court in *Wilckens* v. *Willet* (1 Keyes 521), where it was held that the House of Representatives of the United States had the power to compel the attendance of witnesses. In that case this court said per Johnson, J.: "That the power exists, admits of no doubt whatever. It is a necessary incident of the sovereign power of making laws, and its exercise is often indispensable to the great end of englightened, judicious and wholesome legislation. The power is rather judicial in its nature; but in a legislative body it exists as an auxiliary to the legislative power only." * * *

> (483) Throughout this Union the practice of legislative bodies, and in this State, the statutes existing at the time the present constitution was adopted, and whose validity has never before been questioned by our courts, afford strong arguments in favor of the recognition of the right of either house to compel the attendance of witnesses for legislative purposes, as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which, to say the least, the State legislature has constitutional authority to regulate and enforce by statute.

The doctrine of this case was followed in *People* v. *Sharp* (107 N. Y. 427, 14 N. E. 319; and *People ex rel. Bender* v. *Milliken*, 185 N. Y. 35, 77 N. E. 872).

Massachusetts authorities are in accord. In *Sheppard* v. *Bryant*, 191 Mass. 591, 78 N. E. 394, the court said:

> It is very evident that the Legislature, in view of the state of things then and immediately theretofore existing in this community as to the lack of coal, was thoroughly aroused and, with a view to some legislation, was determined, if possible, to probe to the bottom the circumstances relating to the supply of coal. The order was very sweeping. Under it the committee could properly inquire into the conduct of every coal dealer in the commonwealth, so far as it related to receiving, supplying, or selling coal, or holding or detaining or unloading coal barges at the harbors or wharves.

This phase of the law was settled in Massachusetts as early as 1859 by the decison in *Burnham* v. *Morrissey*, 14 Gray 226.

The above authorities state the rule which obtains in the courts generally:

> The rule deducible from the authorities seems to be that the power of a legislature to investigate, through a committee or commission, the affairs of a private person, corporation, or institution, exists only when such affairs are directly related to the legitimate subjects of legislation. As is said in the reported case (*Greenfield* v. *Russel*, 9 A. L. R. 1334), a legislature has power to obtain information concerning any subject on which it has power to legislate, with a view to its enlightenment and guidance, but it can not violate the constitutional rights of any institution or individual by conducting a public and judicial investigation of any charges made against such person or institution under the pretense or cloak of its power to investigate for the purpose of legislation. (Note 9 A. L. R. 1341.)

In the recent cases of *Stafford* v. *Wallace* (258 U. S. 495) and *Board of Trade* v. *Olsen* (262 U. S. 1) this court recognized the fact that committees of Congress framing the legislation there upheld had before them facts from the reports and hearings of the Federal Trade Commission and from other sources, tending to show that transactions in stockyards and on grain exchanges imposed an undue burden upon interstate commerce, and in the *Stafford case* held

that where Congress decided that certain transactions threaten unduly to burden the freedom of interstate commerce, this court would not substitute its judgment for that of Congress "unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent" (p. 521). It is not conceivable that the court will now hold that, despite the duty of Congress primarily to make this determination, it can not procure the information on which to base its conclusions unless it is voluntarily produced. So to hold would render it possible for those having the information in their possession to defeat the exercise of the legislative function.

> Further it is said, the right to provide (an army) is not denied by calling for volunteer enlistments, but it does not and can not include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a Governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. (*Selective Draft Law cases*, 245 U. S. 366, 377.)

3. It is Not Necessary to Establish in Each Instance that the Information Required is Indispensable to Legislative Action.

Appellees appeared to admit in the court below that if the information is indispensable to legislation, its production may be compelled, presumably on the theory that the power to compel its production is not expressly granted and that only those powers are implied which are indispensably necessary to carry

into effect some power expressly granted. But the decisions reviewed above (supra, pp. 19–25) *demonstrate beyond question that any power will be implied, and any means may be employed which are appropriate to carrying out the powers expressly granted.* Moreover, appellees confuse the existence of the implied power with the wisdom, in a particular case, of the exercise of a power held to be implied. Once the existence of a power is declared by this court it is established for all time and may be exercised from time to time under varying circumstances in the wisdom of Congress.

> No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress. Nor may the court enquire into the wisdom of the legislation. Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence. (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 161.)

The indispensable character of the information is a question which Congress alone can determine. Can the courts, under the separation of powers in the Federal Constitution, hold that persons required to produce information by Congress may in each instance come to the courts for a determination whether it is indispensable to the exercise of the legislative power? Or to put it in a more forceful manner, must Congress constantly resort to the courts for a determination of what is or what is not

necessary to the proper exercise of a power conferred upon Congress by the Constitution? We think not. The distinct holding in the *Chapman*, *Brimson*, and *Smith cases*, *supra*, is that the only question for the courts to determine is, not whether the information is indispensable, but whether it pertains to a subject over which Congress has jurisdiction.

4. The Specific Character of the Action Contemplated by Congress Need Not be Shown in Order that Information may be Required.

Appellees contended also that unless the Commission can show just how Congress could legislate in the light of the information required its production can not be compelled. This contention was made and its soundness denied by the court in the *Chapman case*, *supra*, in the following language:

> Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member. * * *
>
> * * * Indeed, we think it affirmatively appears that the Senate was acting within its

right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded. (166 U. S. at pp. 669–670.)

5. Information Respecting Prices May be Required, Though no Power to Fix Reasonable Prices Exists.

It was contended below that Congress was without power to fix prices in any save quasi public businesses, and that this being true, Congress could not require information respecting prices. To this we reply that this Court will not assume in advance that if the information should disclose high prices and very large profits, Congress has not sufficient wisdom and constructive ability to find some remedy for the situation short of fixing prices. Congress is entitled to an opportunity to exercise its function within its best judgment and then, if it transcend its powers, this Court will declare its action invalid.

Furthermore, appellees' contention assumes that if there are high prices and large profits, they are due to natural causes and not to artificial burdens or restrictions which it may be within the jurisdiction of Congress to remove. One of the purposes of the inquiry was to ascertain not only what prices obtained but what were the causes. When Congress is in possession of this information, it may exercise its judgment with respect to the remedy with the knowledge that the constitutionality of its action must be passed upon by this Court.

6. Information Required Should be Had at Least as to Articles of Prime Necessity.

For many years the common law recognized the difference in the interest which the public has in the prices of articles of prime necessity and the prices of those articles which are not requisites of daily life. Prior to the passage of antitrust laws, State and Federal, the courts consistently refused their aid in the enforcement of contracts to fix the prices of necessaries, or of contracts the effect of which was to lessen or eliminate competition in such commodities (*United Shoe Machinery* v. *La Chapelle*, 212 Mass. 467, 480; *Richardson* v. *Buhl*, 77 Mich. 632, 43 N. W. 1102; *Raymond* v. *Leavitt*, 46 Mich. 447; *Dutton* v. *Knoxville*, 121 Tenn. 26, 113 S. W. 381; *Arnolt* v. *Coal Co.*, 68 N. Y. 558; *Morris Tun Coal Co.* v. *Barclay*, 68 Penn. St. 176), while sustaining similar contracts concerned with articles not of prime necessity (*Gloucester Ising Glass Co.* v. *Russia Cement Co.*, 154 Mass. 92, 27 N. E. 105; *Central Shade Roller Co.* v. *Cushman*, 103 Mass. 353, 9 N. E. 629; *Anheuser-Busch Brewing Assn.* v. *Houck*, 27 S. W. 692, affirmed 30 S. W. 869; *Pacific Factor Co.* v. *Adler*, 27 Pac. 36). In the decisions cited the courts have held that coal, flour, and matches, and classes of articles generally described as "foodstuffs," "necessaries of life," "pure necessities," "indispensable commodities" are among those articles which are of such importance to the public welfare that agreements restricting competition therein were void at common law.

It is apt and proper to apply this distinction in considering the power of Congress to require infor-

mation as a basis of legislation and in construing the terms of the Trade Commission Act and to hold that the information required in the questionnaires may be had at least with respect to articles of prime necessity or with respect to such articles of that class as have become indispensable to the daily life and commerce of the people. It may be here pointed out that the Act of Congress appropriating the sum of $150,000 for the work which the Commission was just beginning when stopped by the injunction, made the money available for information regarding "foodstuffs or other necessaries" (supra, p. 8).

The foregoing discussion leads to the conclusion that Congress has the power to procure information as an aid to legislation, and that the only questions for the courts to determine, where the power is challenged are (a) whether the inquiry is with respect to a subject-matter committed to its jurisdiction, (b) whether the information demanded is relevant to the subject-matter, and (c) whether any constitutional guaranties of the citizens are invaded.[1] Before developing these points in the case at bar, however, we believe it appropriate to show that the authorization of the Commission to secure information for Congress was constitutional.

[1] It appears to be established law in practically all English-speaking countries that the testimony of witnesses and production of documents may be compelled in inquiries which do not involve any question with respect to a breach of existing law. It is held that compulsory power may be exercised by the legislative body or by commissions created by such bodies where the subject matter is one within the legislative jurisdiction of the law-making body and the evidence required is pertinent to the subject matter of the inquiry. In several decisions about the middle of the last century the Privy Council held that legislative assemblies of the

II.

Congress Can Constitutionally Authorize an Administrative Body to Collect Information Respecting Any Subject Over Which It Has Legislative Jurisdiction.

Congress may, without violating the principle that legislative power may not be delegated, authorize an administrative body to collect information respecting any subject over which Congress has jurisdiction. This contention may be rested upon any one of three grounds—(1) that the power to collect information is not per se legislative power but is power which may be delegated; (2) that if it be legislative power, the Trade Commission Act lays down a sufficiently definite rule for the guidance of the Commission, and it does not therefore amount to a delegation; and (3) that the creation of a Commission for the purpose of procuring information for Congress and for the other purposes specified in Section 6 of the Trade Commission Act is an appropriate and constitutional means for carrying into execution the power of Congress to legislate on specific subjects.

Each of these points is discussed below:

1. Legislative power within the meaning of the Constitution is the power to make, amend, alter, or

English colonies did not have power to punish for *contempt* witnesses who refused to appear and testify. (*Kilbourn* v. *Thompson*, 103 U. S. 168; *Keilley* v. *Carson*, 4 Moore's P. C. 63; *Fenton* v. *Hampton*, 11 Moore's P. C. 347.) These decisions do not deny to the power of these bodies to make it an offense, punishable by fine and imprisonment, to refuse to appear and testify with respect to any subject-matter concerning which the legislature may pass laws. (*In re Chapman*, 166 U. S. 661.) In nearly all if not all of the British self-governing dominions statutes were enacted, apparently subsequent to the decisions of the Privy Council above

repeal laws. (Watson on the Constitution, p. 114.) Vesting Congress with "all legislative powers herein granted" has been held to mean that Congress may in its discretion enact any appropriate legislation to accomplish the objects for which the National Government was established. (*Burton* v. *U. S.* 202 U. S. 367). That Congress possesses powers other than those purely legislative, and susceptible of dele-

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referred to, authorizing the appointment of Commissions of Inquiry with power to summon witnesses, which laws provide that it shall be a criminal offense for any person to refuse to appear and testify. (Revised Statutes of Canada, 1906, Ch. 104, amended by Canadian Statutes 1912, Ch. 28; Original Act 31 Vict. Ch. 38; Revised Statutes Manitoba, Ch. 34, Original Act known as Public Inquiries Act, 1873; Public Inquiries Act, Revised Statutes British Columbia, 1911, Ch. 110; New Zealand Commissions of Inquiry Act, 1908; Royal Commissions Act, New South Wales, 1901, Sec. 3.) These acts have been uniformly upheld by the highest courts of the Provinces and Federated Governments, which hold that if the inquiry relates to any of the classes of subjects over which the Government enacting the law has legislative jurisdiction it is valid. In *Northwest Grain Dealers' Association* v. *Hyndman*, 61 Dom. Law Rep. 548 (Manitoba Court of Appeals, November 4, 1921), the Chief Justice says:

"If the inquiry relates to any of the classes of subjects assigned to the Dominion Parliament by Section 91 [British North American Act], authority for the inquiry is given by Section 2 of the Inquiries Act. Even if, as I have above intimated, the order in council or commission covered only one of the subjects it would be valid, but the powers of the commission to compel witnesses to attend and give evidence would be limited to that subject. * * *

"I have no doubt as to the power of the Dominion Parliament to enact the Inquiries Act, R. S. 1906, Ch. 104. The main objection taken is that the expression 'the good government of Canada in Section 2 taken in its widest sense includes provincial subjects of legislation.' The expression was intended to apply to acts and matters coming within the legislative jurisdiction of the Parliament of Canada as that jurisdiction is defined in the B. N. A. Act and interpreted by authoritative decisions. We must assume that Parliament did not intend to exceed its powers in passing the Act. The intention was that commissions appointed under the Act should confine their inquiries to matters into which the Government of the Dominion might lawfully inquire."

To the same general effect are *Kelley & Sons* v. *Mathers* (23 Dom. Law. Rep. 225) sustaining the Public Inquiries Act of Manitoba; *Re Public Inquiries Act* (48 Dom. Law Rep. 237) sustaining the Public Inquiries Act of British Columbia; *Cock* v. *Attorney General* (28 New Zealand L. R.

gation, has been recognized by this court since the early decisions under the Constitution. In *Wayman* v. *Southard* (10 Wheat. 1, 42, 43) Chief Justice Marshall says:

> It will not be contended, that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the

405) holding valid the Commissions of Inquiry Act, 1908; *Clough* v. *Leahy* (2 Commonwealth Law Rep. 129) upholding the Royal Commissions Evidence Act of New South Wales (Stats. 1901, Sec. 3).

In *Attorney General of Australia* v. *Colonial Sugar Refining Co.* (A. C. 1913) the Privy Council held the Royal Commissions Act of Australia No. 12 of 1902 (No. 4 of 1912) unconstitutional for the reason (1) that the General Government of Australia had no power under the constitution to impose new duties on the citizens of the states, and (2) that the terms of that statute were so broad as to include many subjects over which the General Government had no jurisdiction. The decision apparently concedes, however, that had the statute been confined to subjects over which the General Government had jurisdiction it would have been valid. In a very recent decision by the *Privy Council* (*Attorney General of Canada* v. *Attorney General of Alberta* (1922 A. C. 191) Lord Haldane, who wrote the decision of the Privy Council in the Colonial Sugar Refining case, supra, referring to the powers of the Canadian Parliament, said:

"It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, even where such power is construed in a fashion much narrower than that in which it was sought to interpret it in the arguments at the bar for the Attorney General of Canada."

In the British Isles it has been common in recent years for Parliament to create commissions to inquire into matters of general public concern, but not involving any alleged violation of law; to confer upon such commissions power to summon witnesses and compel the production of documents and in this connection to provide that refusal to answer questions or produce documents shall be either a penal offense or punishable as contempt. Examples of such Acts are: Coal Commission Act, 9 Geo. 5, Ch. 1, Public General Acts, 1919; Profiteering Acts, 1919 and 1920, 9 and 10 Geo. 5, Ch. 66, Public General Acts, 1919, and 10 and 11 Geo. 5, Ch. 13, Public General Acts, 1920; Mining Industry Act, 1920, 10 and 11 Geo. 5, Ch. 50, Public General Acts, 1920; Trades Board Act, 1909, 9 Edw. 7, Ch. 22, Chitty's Statutes, Vol. 8, pp. 837, et seq.

> legislature may rightfully exercise itself. * * * The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Procuring information as a basis for legislation is not in itself legislation, and directing an administrative body to procure such information is not authorizing it to legislate. This court in the case of *I. C. C.* v. *Goodrich Transit Co.* (224 U. S. 194) held that requiring information concerning a business is not regulation of that business. It would appear to be equally true that requiring information concerning a business is not in itself legislating with respect to that business—i. e., exercising the power to make, amend, or repeal laws—but only a necessary incident to the exertion of that power, an indispensable incident to its intelligent and effective exercise.

The legality of delegating to committees of legislative bodies and to commissions power to make investigations and report facts to such bodies has been expressly upheld or assumed in a number of cases. The statute upheld in the *Chapman case, supra*, made it an offense to refuse to testify before committees of Congress, and the decision in *Smith* v. *Interstate Commerce Commission, supra*, sustaining the power of the Commission to compel the pro-

ducing of information in an investigation not concerned with a violation of law is consistent only with the proposition that the delegation of authority to procure it was lawful. The Court of Appeals of New York has held that commissions may be lawfully authorized to make such inquiry and that "the function so performed by the commission is strictly analogous to that of a legislative committee of inquiry or investigation." (*People ex rel. Bender* v. *Milliken*, 185 N. Y. 35.)

2. If, however, the power of Congress to procure information is per se legislative power within the meaning of the Constitution, it is nevertheless contended that Section 6 of the Trade Commission Act lays down a sufficiently definite guide for the Commission and is not therefore unconstitutional as amounting to a delegation. (*Field* v. *Clark*, 143 U. S. 649; *Union Bridge Co.* v. *U. S.*, 204 U. S. 364; *Butfield* v. *Stranahan*, 192 U. S. 470.) That section authorizes the Commission to make investigation into and require annual and special reports concerning "the organization, business, conduct, practices, and management" of corporations engaged in interstate commerce. This language is quite as definite as that portion of Section 12 of the Act to regulate commerce which authorizes the Interstate Commerce Commission "to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the

same is conducted." That statute was upheld by this court in *Smith* v. *Interstate Commerce Commission, supra,* and in *Goodrich Transit case, supra.* Other statutes much broader and less definite than the quoted portions of the Trade Commission Act and reposing broader discretion in executive officers or administrative bodies have been held by this court not to amount to an unconstitutional delegation. (*U. S.* v. *Grimaud,* 220 U. S. 506; *Union Bridge Co.* v. *U. S.,* 204 U. S. 364.)

The discretion reposed in the Commission in the present relation by the statute is obviously neither as broad nor susceptible of such oppressive use as that reposed in other officers of the Government by the statutes upheld in the cases cited.[1]

3. Under the complex conditions of modern civilization it is manifestly impossible for Congress, operating through committees, to procure the vast amount of data desirable as a basis of considering legislation on such matters as the regulation of commerce, the passage of tax measures, including tariff laws, and similar intricate and difficult subjects with which Congress must deal almost continuously. If Congress itself has the power to compel the production of information respecting such subjects, it is submitted that the creation of an administrative body for this purpose is a proper means for carrying

[1] Not including investigations instituted at the direction of the President during the World War and inquiries growing out of those investigations, it may be noted that of approximately 34 general inquiries into industrial conditions conducted by the Commission since its organization 27 were directed by resolutions of either the Senate or House of Representatives, 2 by the President, and only 5 instituted on the initiative of the Commission.

into effect its power. Since the decision of this court in *McCulloch* v. *Maryland* (4 Wheat. 315, 422) it has never been doubted that Congress may adopt any appropriate means of carrying into execution any power or powers expressly granted to it.

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional. (*McCulloch* v. *Maryland*, 4 Wheat. 315, 421.)
>
> By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary without which the powers granted must fail of execution, but they include all appropriate means which are conducive or adapted to the end to be accomplished and which in the judgment of Congress will most advantageously effect it. (*Legal Tender Cases*, 110 U. S. 421, 440. See also *United States* v. *Fisher*, 2 Cranch, 358, 396; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 424.)

That Congress itself considers the means appropriate is shown by its repeated use in the creation of such bodies as the Interstate Commerce Commission, the Tariff Commission, the recent Coal Commission, and similar bodies, and by the power conferred on the Secretary of Agriculture by the Packers and Stockyards Act of 1921 and the Grain Futures Act.[1]

[1] 42 Stat. 159; 42 Stat. 998, respectively.

We now pass to the consideration of the questions whether the subject matter is within the jurisdiction of Congress and whether the information required is pertinent to the subject matter.

III.

Jurisdiction of Congress Over Interstate Commerce and Extent of the Power to Require Information.

1. Commerce Among the States Includes the Purchase and Sale of Commodities Between Citizens in Different States.

The extent of the jurisdiction of Congress over commerce among the States has been so often defined by this Court on such a variety of facts and in such varying circumstances that any discussion of it here would be unnecessary were it not for the fact that the Court of Appeals appears to have been of the opinion that interstate commerce comprehends only transportation and matters immediately connected with transportation. (Rec. pp. 119 et seq.) So to hold would be contrary to the decisions of this Court from its inception. Even to suggest such a construction casts doubt where from the beginning there has been nothing but certainty, and freely concedes jurisdiction in the very field where for a time its existence was seriously questioned. The purchase and sale of commodities between persons negotiating from different states, followed by the transportation of commodities to other states, has always been held to be interstate commerce.

> The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not

> of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. (*Gibbons* v. *Ogden*, 9 Wheat. 1, 188.)

The accuracy of this holding has never been questioned. On the contrary, the statement of Chief Justice Marshall has been amplified, and interstate commerce held to comprehend all contracts and negotiations looking to the introduction of commodities from one State to another. (*Crenshaw* v. *Ark.*, 227 U. S. 389; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stewart* v. *Michigan*, 232 U. S. 665; *Rearick* v. *Penna.*, 203 U. S. 507; *Dozier* v. *Ala.*, 218 U. S. 124; *Davis* v. *Va.*, 236 U. S. 697.) The purchase of commodities within a State, where the proven course of business was that commodities so purchased were always shipped to another State, has specifically been held to be a part of interstate commerce (*Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282), as well as the sale at destination after shipment from other States (*Swift & Co.* v. *U. S.*, 196 U. S. 375; *Brown* v. *Maryland*, 12 Wheat. 419; *Stafford* v. *Wallace*, 258 U. S. 495).

Control by the Federal Government over railroads, telegraph companies, telephone companies, and other means of transportation and transmission of intelligence was assumed originally on the theory that they were agencies or instrumentalities of that traffic and barter and sale which had always been recognized as interstate commerce. (*Gibbons* v. *Ogden*, 9 Wheat. 1; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460.)

In view of the historical development of the construction of the commerce clause it can not now be held that the power to regulate commerce extends only to the instrumentalities of commerce and not to the purchase and sale of commodities.

2. Power to regulate extends to all matters which may burden or restrain interstate commerce, even though not actually a part thereof.

The power to regulate comprehends not only the direct regulation of commerce among the States but includes, as well, such incidental regulation of intrastate commerce and of manufacture as may be necessary to the complete regulation of interstate commerce; and includes the authority "to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." (*Houston & Texas Ry. Co.* v. *U. S.*, 234 U. S. 342, 353; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*, decided by this court February 27, 1922.)

The power includes also the right to deal with acts not themselves interstate commerce, but which burden or threaten to burden or obstruct commerce (*U. S.* v. *Ferger*, 250 U. S. 199) and to remove or prevent the imposition of burdens or restraints upon such commerce where the persons imposing such burdens or restraints are not engaged in interstate commerce (*U. S.* v. *Patten*, 226 U. S. 525), or where they are not engaged in commerce either State or interstate (*Loewe* v. *Lawlor*, 208 U. S. 274).

In *Stafford* v. *Wallace*, 258 U. S. 495, this Court in referring to *U. S.* v. *Ferger*, *supra*, said:

> It was contended that there was and could be no commerce in a fraudulent and fictitious bill of lading, and therefore that the power of Congress could not embrace such pretended bill. In upholding the act, this court, speaking through Chief Justice White, answered the objection by saying:
>
> "But this mistakenly assumes that the power of Congress is to be necessarily tested by the *intrinsic existence of commerce in the particular subject dealt with, instead of by relation of that subject to commerce and its effect upon it.* We say 'mistakenly assumes,' because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In re Debs*, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon inter-

> state commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

That the power to regulate interstate commerce includes, if need be, direct control of manufacturing operations is manifest from the decrees by which combinations of companies engaged in manufacturing and in selling in interstate commerce, held to be in violation of the Sherman Law, have been dissolved with respect to the manufacturing operations as well as with respect to sales in interstate commerce. (*Standard Oil Co.* v. *U. S.*, 221 U. S. 1; *U. S.* v. *American Tobacco Co.*, 221 U. S. 106; *U. S.* v. *International Harvester Co.*, 214 Fed. 987; *U. S.* v. *Reading Co.*, 226 U. S. 324, S. C. 253 U. S. 27.) It is significant, in view of the unqualified holding of the Court below that Congress has no jurisdiction over manufacturing, to note that the decrees in these cases do not separate these combinations horizontally and attempt to dissolve the combinations with respect to the sales in interstate commerce only, but divide them vertically, giving to each unit in interstate commerce its own manufacturing plant, mines, or other sources of supply of the commodities sold.

3. Power of Congress to Require Information Respecting Interstate Commerce is Broader than the Power to Regulate, and Extends to Ascertaining What, if any, Burdens or Restraints upon Such Commerce are Threatened.

Since, as shown in the preceding paragraphs, the power to regulate includes the right to remove burdens or restraints imposed from without the realm

of interstate commerce, Congress must necessarily have power to ascertain, by compulsory process if necessary, whether burdens or restraints threaten interstate commerce.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, this Court held that the Interstate Commerce Commission could require of steamboat companies having arrangements with railroad companies for joint through carriage in interstate commerce, information not only respecting their joint rail and water interstate business, but also respecting port to port interstate water traffic, traffic wholly within the State, and information as well respecting the earnings of pleasure resorts operated by the companies. From the opinion it appears to be clear that the Interstate Commerce Commission had the power to require this information *as well for the purpose of reporting it to Congress and making recommendations for legislation*, as for the purpose of administering the laws committed to it for enforcement. There the Court said in part:

> We must remember, also, in this connection, that under Sec. 21 of the Act the Commission is required to make a report each year to the Congress containing such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation as the Commission may see fit to make. (224 U. S. at 208.)

Again, after reciting the Commission's power to require annual reports, the court said:

> We think this section contains ample authority for the Commission to require a system of accounting as provided in its order and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness *and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned.* (Id. p. 211.)
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> * * * * *
>
> We think the Act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress, and, conceding for this purpose that the regulating power of the Commission is limited so far as rates are concerned to joint rates of the character named in Sec. 1, it is still essential that to enable the Commission to perform its required duties, even with respect to such rates, *and to make reports to Congress of the business of carriers subject to the terms of the Act,* it should be informed as to the matters contained in the report (p. 213).

In *Stafford* v. *Wallace*, *supra*, this Court said, at p. 521:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

It being, therefore, primarily the duty of Congress to ascertain the danger of such burdens, its power of inquiry must be broad enough to ascertain the facts and includes the right to require information respecting both interstate and intrastate commerce as well as production and any matter which may burden or restrain such commerce. This must certainly be true of corporations engaged both in interstate and intrastate commerce. To hold that Congress may require information respecting the interstate commerce of corporations but may not demand it as regards their commerce wholly within a state is to say that the legislature must proceed blindly in a field where the Constitution itself requires that it shall proceed with greatest care; that is, in the field of intrastate commerce, where only such regulation may be resorted to as is necessary to carry out the power conferred to regulate interstate commerce.

The greater the restriction upon the power to regulate, the more necessary does complete information respecting the business become, in order that Congress may not inadvertently transcend its powers and enact legislation which will be declared invalid when the full facts are brought out in litigation seeking to have the laws declared unconstitutional.

IV.

The Information Called for by the Questionnaires Concerns Interstate Commerce Itself, or Matters so Closely Related Thereto as to be Necessary to an Intelligent Report upon Conditions Existing in such Commerce, and may be Lawfully Required.

We shall now show (1) that the information called for by the questionnaires, taken as a whole, is necessary in order to ascertain whether the normal relation of supply to demand in interstate commerce is being disturbed; (2) that each item of the information, taken separately, relates to subject-matter concerning which the Federal Government may, in a proper case, legislate, and (3) that it is impossible to segregate the required data between the interstate and intrastate commerce.

1. The Information Is Necessary to Show Whether the Law of Supply and Demand Operates.

At the time this inquiry was instituted, prices of commodities, including necessaries of life and of commerce, had reached perhaps unprecedentedly high levels. One purpose of the investigation interrupted by the injunction was to ascertain and dis-

close the causes of these high prices—whether they were due to the natural operation in interstate commerce of the law of supply and demand, or to artificial conditions obstructing interstate commerce.

For this purpose it is essential to have the fundamental data for analyzing supply and demand conditions for the more important commodities in this industry, namely, prices actually received, prices made for future deliveries, orders on the books, currently being taken and the total outstanding, as indicative of demand conditions, and the quantities produced, the capacity to produce, the costs of commodities sold, and the profits of the business, as indicative of supply conditions.

These facts when collated and compared will tend to show whether high prices were due to abnormal demand, high costs, or artificial market control, and if such control is indicated will give a substantial basis for more specific inquiry into the circumstances and the persons responsible therefor.

Such information will also serve to show whether there were any trade policies pursued which might be deemed inconsistent with the public welfare, such as excessive exports when there is domestic scarcity, or low export prices when high prices prevail in the home markets, and such as may be deemed by Congress to necessitate remedial action.

The information respecting prices charged will reveal whether prices are uniform in domestic and foreign commerce. Furthermore, to a clear understanding of prices in foreign commerce and the

causes of existing prices, information respecting prices generally charged in internal commerce is necessary. An examination of prices charged in internal and foreign commerce may disclose that internal prices are much higher than foreign prices, and that internal commerce is therefore being discriminated against. The same is true of a comparison of prices between interstate and intrastate commerce.

Again, current sales prices were requested, together with the unit cost of the commodity sold. The comparison of these two figures will show the unit profit made. If the profit be very large, resort can then be had to the statistics with respect to the quantities produced and with respect to productive capacity. If these figures show that the mills are producing to capacity, the conclusion may be reached that the high prices and large profits are due, at least in a large measure, to demand not only in excess of production but also of capacity to produce. On the other hand, these figures may disclose that the mills are producing only a fraction of their capacity and the unusual prices will have to be attributed to some cause other than demand in excess of actual or potential production. Further inquiry may disclose that the real cause can be traced to agreements to limit production or artificially to obstruct it. Information respecting quantities for which orders were booked during the month, and unfilled orders outstanding at the end of the month, will throw further light on the state of current demand and the

relation of that demand to production and productive capacity.

The balance sheets called for, together with the data as to earnings, will disclose the rate of return to the corporation on capital invested and whether the business is profitable, which is an essential factor among the conditions of supply, because unprofitable conditions in industry lead to the discontinuance of operations.

2. Each Item Required Relates to Subject Matter upon Which Congress may Legislate.

The specific classes of information called for in the questionnaires, taken singly as well as collectively, relate directly to interstate commerce or to subjects so affecting such commerce that they may be subject to federal control.

(*a*) *Prices.*—The essence of interstate commerce is the purchase and sale of commodities between persons in different states where interstate shipment is caused by such purchases and sales. The solicitation of such sales in states other than that from which the shipment is made, the contracts for sale and all negotiations leading up to such sales, and all acts or transactions connected with such sales are, under established law, a part of interstate commerce itself (supra, pp. 44–45 and cases there cited). Obviously, the prices prescribed in such contracts of sale is information respecting interstate commerce.

The Sherman Law, as construed by this court, is largely concerned with the question of prices in interstate commerce. In probably every case in

this court dealing with voluntary combinations in alleged violation of the Sherman Law, the question of the power of the combinations to "fix the price" and "arbitrarily to enhance prices" [1] in interstate commerce has been considered by the court as of prime importance in the decision. Clearly, therefore, information respecting prices of commodities sold in interstate commerce is information respecting such commerce.

(*b*) *Cost of commodities sold in interstate commerce.*—Information respecting the cost of a commodity sold in interstate or foreign commerce—the cost of a subject of such commerce—is information respecting that commerce and not information respecting production or intrastate commerce only. The cost of a commodity may be either (1) the cost of manufacturing it, (2) the price paid for it in interstate or foreign commerce, or (3) the price paid for it in intrastate commerce, according to whether the commodity sold is manufactured or purchased and the source from which purchased. In an inquiry respecting conditions in interstate commerce, a corporation manufacturing that which it sells would be requested to supply the cost of manufacture. Corporations purchasing in interstate commerce that which they sell would be requested to supply data as to their purchase prices and a similar request would be made if the commodities sold in interstate commerce were purchased within the state from which shipment was

[1] Chief Justice White in *Standard Oil Company* v. *United States*, 221 U. S. 1, 52.

made in interstate commerce. In either of these situations the cost of the thing sold in interstate commerce is information respecting interstate commerce. Where a corporation manufactures a commodity the cost of producing it will throw light both on the question of manufacture and on the question of interstate commerce, and doubtless in a proper case could be demanded by the State or Federal Government.

(c) *Statistics of production and productive capacity.*—Where corporations engage both in manufacture and in interstate commerce, the question of production and of productive capacity as affecting interstate commerce is one within federal jurisdiction. It is established by decisions of this court that agreements between companies engaged in the manufacture of commodities which they habitually sell in interstate commerce, limiting the quantity to be manufactured, and thus, by reducing the supply for sale in interstate commerce, increasing prices in such commerce, are in violation of the Sherman Antitrust Law.

In the recent case of *American Column & Lumber Company* v. *United States* (257 U. S. 377), the court appears to have considered that the gravamen of the offense of the defendants was the limitation of the quantity of lumber *manufactured* in order thereby to increase prices in interstate commerce. The court there said in part:

> Much more of like purport appears in the minutes of the meetings throughout the

year, but this is sufficient to convincingly show that one of the prime purposes of the meetings, held in every part of the lumber district, and of the various reports, was to induce members to cooperate in restricting production, thereby keeping the supply low and the prices high, and that whenever there was any suggestion of running the mills to an extent which would bring up the supply to a point which might affect prices, the advice against operations which might lead to such result was put in the strongest possible terms. * * *

* * * This is not the conduct of competitors, but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a *combination to restrict production* and increase prices in interstate commerce, and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. * * *

* * * To call it open competition * * * can not conceal the fact that the fundamental purpose of the "Plan" was to procure "harmonious" individual action among a large number of naturally competing dealers with respect to the volume of *production* and prices, without having any specific agreement with respect to them. * * *

Convinced, as we are, that the purpose and effect of the activities of the "Open Competition Plan" here under discussion were to

> restrict competition, and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber by concerted action in *curtailing production* and in increasing prices, we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Antitrust Act of 1890, and the decree of that court must be affirmed.

In the instant case, if the Commission's investigation should disclose high prices and large profits, together with idle productive capacity, the Government would at least be put on notice to inquire further respecting the cause of these conditions of restricted output.

(*d*) *Orders booked during month and unfilled orders outstanding at end of month.*—Information respecting orders booked during the month and unfilled orders outstanding, so far as such orders relate to contracts for sale in interstate commerce, is information respecting such commerce. All contracts for the sale of commodities between persons in different states which contemplate an interstate movement of the commodity are a part of interstate commerce (supra, p. 45). This portion of the questionnaire asked for quantities of commodities contracted to be sold during the month, and for the total quantities of the same ordered but not yet shipped. That this is information respecting interstate commerce needs no argument.

(*e*) *Balance sheets.*—The balance sheets, together with the income statement called for, will serve to show the return to corporations engaged in interstate commerce upon the capital invested. Without the balance sheet the other information requested may show a large amount of operating profit. On the other hand, the investment may be so large that the rate of profit is very small. Again, the balance sheet is a check upon the accuracy of the income statement required.

Furthermore, in order to determine the accuracy of the report as to the profits of operation and in order to ascertain what the investment is for any company, it is necessary to have a detailed balance sheet. The balance sheet must be complete to be satisfactory, and it may be, and indeed often is, true that items appear in it which are not in themselves of interest in connection with the steel business of the companies, but nevertheless are indispensable for an accurate balance-sheet statement.

The special reason for getting a balance-sheet statement of these companies in detail is to ascertain whether there are items not relevant to the steel business which may be eliminated from consideration in computing the amount of the investment employed in the steel business. Similar eliminations being made of items in the income account, it is possible to compare the earnings from the steel business with the investment therein in order to show the real rate of profit from the steel business. For example, if a company owned a large amount of rail-

road stock and received dividends therefrom, it would give a more accurate statement of what its profits from the steel business were to take such stock from the total investment and to exclude dividends from such stock in any computation of the net earnings from the steel business.

3. Impossibility of Segregating Required Data as Between Interstate and Intrastate Commerce.

From what has already been stated (supra, pp. 52–54) it would appear that all of the data required by the Commission are necessary to an understanding of conditions existing in interstate and foreign commerce and of the causes of the conditions. Even if this were not true, it would nevertheless be impracticable and, as respects the greater portion of the data, impossible to segregate it so as to respond to a demand for the information exclusively with respect to interstate commerce.

Take first the question of prices, where it is more nearly practicable than in any other matter to make a distinction between interstate and intrastate commerce. From the standpoint either of information regarding interstate commerce or of the regulation thereof the first thing to know is the general level of prices for the business and the changes therein from time to time; the second thing is the differences in prices in one locality or to one class of customers compared with another. Prices are made and commodities are generally sold without regard to state lines. Such internal local price discrimination as exists is not distinguished by state lines but by

natural trade boundaries or transportation cost, competition of other localities, and the like. It was not deemed necessary in these questionnaires to develop the complex facts concerning local price discriminations in interstate commerce at the outset of the inquiry. They and other discriminations in price were left rather for further study and inquiry. Moreover it would be much easier and more practicable to determine whether a sale was intended for foreign as distinguished from domestic trade than to distinguish between interstate and intrastate sales. It is quite common to keep records of sale separately for domestic and for foreign commerce, but not for interstate and intrastate commerce. Hence there being no probable important difference to be disclosed affecting sales in interstate and intrastate commerce and such differentiation in the manufacturers' books not being commonly carried and being difficult to determine therefrom, answer concerning prices exclusively for interstate sales was not called for. So far as the public interest was concerned the average of all domestic sales was deemed sufficient. In this connection it is also important to note that this is really nearly equivalent to interstate sales as all these companies (with one or two unimportant exceptions) sell the great bulk of their products in interstate commerce. To ask them to segregate the interstate part of their sales would be requiring a great deal of work for no practical purpose.

When it comes to figures of production and capacity, it is absolutely impossible to conceive, even, of a

separation of capacity used for interstate as distinguished from state business, much less to make any such return. The same plant or capacity to produce is used for products destined or ultimately directed to either kind of trade. The same statement is largely true of production quantities. For many products there is no possibility of saying when they are made whether they will go into interstate trade or into foreign trade. The commodity may be made long in advance of an order, it may be (as is especially true for pig iron and semifinished steel) indeterminate with respect to what final sales product it will be converted into. Even for important finished products there is more or less manufacture of standard specifications either "to stock" or to fill specific orders which are not determinate as to destination when produced. In other words, what is produced during a given month may be quite a different set of individual units of a commodity from the units that were sold during the same month. While they are a factor in the supply, they are not necessarily shipped immediately after they are produced and their destination may not be definitely determined until that time. It would, therefore, be generally impracticable and even impossible to make a segregation of production between intrastate, interstate, and foreign production or capacity for production. Furthermore, even if the segregated information were obtained it would be totally insufficient and defective for any useful purpose. What is needed for the

proper appreciation, criticism, or judgment of prices in interstate commerce is the data as to supply and demand as a whole. The interstate part of supply and demand can not be used alone for an intelligent judgment of prices, since the question whether the steel industry is functioning in harmony with economic laws or in subservience to manipulation has no relation to the artificial boundaries of states.

As to costs, it is obvious that these can not be separated, generally speaking, for the steel industry with respect to costs for products shipped in interstate commerce and costs for products shipped in intrastate commerce. The costs are average results for the whole quantity produced over definite periods of time. The destination generally is not and often can not be determined when the product goes through the mill and the data for making up the costs are recorded. The producing company generally could not, therefore, give interstate and intrastate costs separately. The primary purpose of the costs is to compare them with the selling prices to see if the goods are sold at a profit or at a loss. The costs are for the total quantity produced in a certain period, and they are compared with the prices of the total quantity of the same kind of goods sold during the period, due account being taken of change in inventories.

For this reason also it is evident that the prices must include not only the prices for goods sold in interstate commerce but also the prices for similar goods sold in intrastate commerce.

The Commission averred in its amended answer and it is to be taken as a verity:

> * * * and these defendants further aver that the interstate and intrastate commerce of each and every of the complainants is conducted as a single nonseparable whole.
>
> * * * that the power of Congress to obtain information is not limited to interstate commerce but may include intrastate commerce as well, when the two phases are a part of one subject.

Jurisdiction over interstate and foreign commerce can not be defeated by commingling such commerce with intrastate commerce.

> The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied by commingling interstate and intrastate operations. (*Minnesota Rate Cases* 230 U. S. 352. See also *Railroad Commission of Wisconsin et al.* v. *Chicago, Burlington & Quincy R. R.*, 257 U. S. 563.)

V.

Congress Has Power to Provide for the Investigation of Corporations and the Compulsory Making of Reports by Them, and for the Publication of the Facts for the Purpose of Applying the Corrective Force of Public Opinion to the Practices of Corporations.

The Trade Commission Act (Section 6) not only provides for the investigation and requiring of annual reports respecting the conduct, organization, manage-

ment, and business of corporations engaged in interstate commerce but provides also that the Commission shall have power—

> * * * to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and the names of customers, as it shall deem expedient in the public interest.

The legislative purpose in enacting these provisions was to invoke the force of intelligent public opinion as a corrective of practices deemed inimical to the public welfare. The conviction that proper publicity respecting methods and practices of corporations engaged in interstate commerce was one of the most efficacious methods of eliminating that which was detrimental to the public and of preventing agreements, combinations, and other monopolistic practices appears to have persisted in the legislative mind for some years immediately preceding the passage of the Trade Commission Act. The suggestion of the desirability of some bureau or department of the Government whose duty it would be to make investigations and publish facts respecting such matters first appeared in the preliminary report of the Industrial Commission of 1900 and was repeated in the final report of that body in 1902.[1] The idea first found expression in law in the Act creating the Bureau of Corporations (32 Stat. 825). It appears subsequently, in the order named, in the corporation

[1] See Appendix A, Report 533, House Committee on Interstate Commerce, on the Trade Commission Bill, 63d Congress, 2d Session, Paragraphs 17–19.

tax provisions of the Tariff Act of 1909 (36 Stat. ch. 6, pp. 11, 112–117), the Federal Trade Commission Act (ch. 311, 38 Stat. 717), and the Transportation Act of 1920 (ch. 91, 41 Stat. 456, 469).

The Corporation Tax Law provided "that returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such." By the amendment of June 17, 1910, it was provided that the returns should be open to inspection only upon order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President. To the contention that this provision, both as originally passed and as amended, was violative of the Fourth Amendment to the Federal Constitution, this court said:

> But we can not agree to this contention. The taxation being as we have held, within the legitimate powers of Congress, it is for that body to determine what means are appropriate and adapted to the purpose of making the law effectual. In this connection the often quoted declaration of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, is appropriate: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Con-

> stitution, are constitutional." Congress may have deemed the public inspection of such returns the means of more properly securing the fullness and accuracy thereof. (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 175–176.)

Title III of the Transportation Act of 1920 creates a Railroad Labor Board with power to investigate and hear any dispute involving grievances, rules, or working conditions, to render decisions thereon, which shall establish standards of working conditions which are in the opinion of the Board just and reasonable and to give publicity to its decisions in such manner as the Board may determine. Its decisions are not binding upon the parties to the dispute; and no court review is provided. Power to compel testimony of witnesses and the production of documents, and to inspect the records of the companies, fully as comprehensive as that conferred upon the Federal Trade Commission is found in the Railroad Labor Board Act. This court, in *Pa. R. R. Co.* v. *U. S. Railroad Labor Board et al.* (decided February 19, 1923), upheld the law and aptly described the legislative purpose of its provisions in the following language:

> The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to

> the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it. * * *
>
> The Board is to act as a Board of Arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for cooperation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which, in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the Act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision.

Section 6 of the Trade Commission Act clearly sought to apply the same corrective force to methods of industrial corporations which the Transportation Act applies to carriers and their employees. It

authorizes investigation and publication of facts. It does not, as does the Transportation Act, authorize the establishment of any standard of prices or of practices (under Section 5 it may declare that methods of competition are unfair), but the absence of such power argues for the validity of the bill rather than for its invalidity.

It is submitted that Congress, having the right to regulate interstate commerce, may adopt any means adapted to that end (supra, pp. 19–20), and if in its opinion investigation and publication of the facts will tend not only to correct abuses but prevent the use of practices in interstate commerce which are inimical to the public welfare it may constitutionally employ such means.

If, in the instant case, the publication of the facts respecting prices, profits, and production of steel products should show very large profits in the industry as a whole (it is always to be remembered that the costs and profits of particular companies are not to be disclosed; see Commission's answer, Rec. p. 81), and as a result some or all of the companies had voluntarily reduced their prices, who is to be heard to complain?

In the mind of Congress a "purpose of such publicity" is to encourage competition when profits become excessive.[1] Thus is to be supplied a corrective of great worth, obviating in part the necessity of the evils of litigation and legislation to maintain competitive conditions.

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[1] Appendix A, paragraph 18.

It was competent also to provide as an indispensable means of ascertaining the facts in connection with such inquiry and publication that the Commission should have the power to require annual reports from corporations engaged in interstate commerce and to compel the testimony of witnesses respecting the conduct, management, etc., of such corporations, provided no constitutional guaranty is invaded. This question is discussed elsewhere in this brief (infra, p. 81).

It is obvious from the above that the Railroad Labor Board was not created to ascertain breaches of existing law, but to prevent by hearing, decision, and publication obstructions to interstate carriage. This Court nevertheless held the statute valid. Similarly, compulsory power may be conferred upon the Federal Trade Commission in order to procure facts for publication with respect to practices of industrial corporations, with a view to correcting such practices.

VI.

Congress Has Power to Compel the Giving of Information and Production of Documents to Ascertain Whether the Laws Which the Commission is Charged with Enforcing Are Being Violated, and Demand Therefor Falls Within the Visitorial Power of Congress Over Corporations Engaged in Interstate Commerce.

There no longer appears to be any doubt respecting the power of the Federal Government to procure from corporations engaged in interstate commerce any information reasonably necessary to the adminis-

tration of any law regulating such commerce. (*Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194.) It has been repeatedly held that the visitorial power of the states over corporations of their own creation, as well as over foreign corporations doing business within their borders, extends to requiring the production of any facts which will disclose whether the laws of the state are being observed. The visitorial power of the Federal Government over corporations engaged in interstate commerce is at least as great as that of a state over corporations of its own creation. (*Hale* v. *Henkel*, 201 U. S., 43; see also infra, pp. 84–86.)

The Commission is charged by the Trade Commission Act with preventing the use of unfair methods of competition in interstate commerce; and is also charged by Section 11 of the Clayton Act with preventing violations of Sections 2, 3, 7, and 8 of that Act.

The information required may well tend at least to show that agreements to fix prices were being made or that agreements to restrict output were in effect. These would be practices having a dangerous tendency unduly to hinder competition and would presumably be within the jurisdiction of the Trade Commission to prevent. (*Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441.) The data may disclose facts tending to show that discriminations in prices contrary to Section 2 of the Clayton Act are being made.

The appellant's amended answer alleged:

> That the Federal Trade Commission required answers to such questionnaires for all the purposes and under all the authority granted to them by law, including the purpose of gathering and compiling said information for publication * * * and including the purpose of making reports to Congress and of recommending additional legislation to Congress. (Rec. pp. 78–79.)

VII.

The Trade Commission Act Authorizes the Commission to Require the Information and Reports Specified in the Questionnaires.

1. The Commission's Action was within the Text of the Law.

Section 6, paragraphs (a) and (b), of the Trade Commission Act, provides that the Commission shall have power to gather and compile information concerning, to investigate from time to time, and to require annual or special reports, or both, concerning the "organization, business, conduct, practices, and management of any corporation engaged in commerce" except banks and common carriers. (See supra, pp. 14–15, for these paragraphs in full.)

We submit in all earnestness that there is no trace of ambiguity in the statutory language here involved. But if such should be found, the following discussion will, we believe, resolve it in favor of our position:

> Commerce is business within the definition of business as given in Webster's International Dictionary, defining the word as "offi-

> cial dealings; buying and selling; traffic in general; mercantile transactions." (*City of Topeka* v. *Jones*, 86 Pac. 162, 163.)
>
> Business is a more comprehensive term and comprises everything about which a person can be employed. (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107.)

Certainly information respecting prices, costs of production, the quantity of commodities produced, orders booked, and orders remaining unfilled is information respecting the "business" of the appellee corporations within the above definitions.

2. The Commission's Action was in Harmony with the Long Interpretation of This and Other Acts by the Government.

Moreover, in seventeen years prior to the issuance of the restraining order issued in this suit, the language of Sections 6 (a) and (b) above quoted, or the less comprehensive language of the Act creating the Bureau of Corporations,[1] had been construed and administered by the Government as including information of the identical character required in the questionnaires involved in the instant case. A number of the very comprehensive reports issued by the Commissioner of Corporations contained data with respect to production, prices, and profits; and one such report on the steel industry included data respecting the costs of producing steel in practically the entire industry, showing generally average costs.[2]

[1] The words of that Act are "organization, conduct, and management." The comprehensive term "business" is added in the Trade Commission Act.

[2] Report of Commissioner of Corporations on the Steel Industry, Pt. III.

Reports of the Federal Trade Commission have contained the identical character of information.[3] In fact, the Federal Trade Commission, variously constituted as it has been since 1915, has uniformly since its inception placed an interpretation upon the Trade Commission Act as regards obtaining information identical with the interpretation made when the demands were made upon the respondent corporations.

This consistent interpretation of the Act has, under the decisions of this court, an important legal effect. As early as 1832 Mr. Justice Story in interpreting a statute gave great weight to the construction which had been "practically acted upon by the government, as well as by individuals, ever since its enactment," and held that "so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition." (*U. S.* v. *State Bank of N. C.*, 6 Pet. 29, 39.)

From the beginning of the history of this court, "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." (*Edwards* v. *Darby*, 12 Wheat. 206, 209; *U. S.* v. *Moore*, 95 U. S. 760, 763; *Robertson* v. *Downing*, 127 U. S. 607, 613; *U. S.* v.

[3] Pipe Line Transportation of Petroleum; Prices of Gasoline, 1915; Pacific Coast Petroleum Industry, Pts. I and II; Report on Fertilizer Industry; Grain Trade, Vols. I and IV; Causes of High Prices of Farm Implements; House Furnishings Industry, Pt. 1; Report on Leather and Shoe Industry; Coal, Report on Cost of Production.

Philbrick, 120 U. S. 52, 59; *Fairbank* v. *U. S.*, 181 U. S. 283, 310; *U. S.* v. *Falk*, 204 U. S. 143, 152; *Komada* v. *U. S.*, 215 U. S. 392, 396.) This principle "should ordinarily control the construction of the statute by the Courts." (*Pennoyer* v. *McConnaughy*, 140 U. S. 1, 23.)

Furthermore, Congress was fully advised, by reports made to it by the Commissioner of Corporations, of the administrative interpretation given to that Act and frequently by resolution called for such reports. That other Departments and independent establishments of the Government gave the statute the same construction is evidenced by the fact that during the World War the Commission was appealed to by the War Trade Board, the War Industries Board, and other Government agencies to invoke the Act and ascertain the facts and determine the costs of many commodities as a basis for fixing prices to be paid by the Government. Among the industries called upon by the Commission to make reports as a basis for this work were coal, coke, iron ore, pig iron, steel, copper, lead, zinc, petroleum oils, cement, tile, fire brick, lumber, cotton textiles, acids, wood chemicals, flour, and meat products.

The foregoing summary of activities is of important legal significance. The fact that a construction of an administrative branch of the Government for many years placed upon an act entrusted to its execution is "without any attempt of Congress to change it, and without any attempt, as far as we are advised, of any other department of the govern-

ment to question its correctness," is evidently deemed conclusive in case of statutory ambiguity. (*Robertson* v. *Downing*, 127 U. S. 607, 613.)

Not only, as above shown, did other branches of the government forbear to "question the correctness" of the interpretation of the Trade Act by the Commission, but they had constant recourse to the Commission for information, in the full conviction that the power to obtain the facts was lawfully asserted by the Commission.

3. The Commission's Action was in Harmony with the Congressional Interpretation of the Trade Commission Act.

It should be added also that Congress when considering the Trade Commission Bill was, for reasons above shown, fully aware of the construction given by the several Commissioners of Corporations to the Act creating the Bureau of Corporations, and with this interpretation before it employed the same language, adding to it the word "business." This action amounts practically to an express adoption by Congress of the construction previously given the Act by the Government. That interpretation, as has been shown, was practically identical with that of the Commission insisted upon here.

This court has often decided that "the reenactment by Congress, without change, of a statute which had previously received long continued executive construction is an adoption by Congress of such interpretation." (*U. S.* v. *Hermanos*, 209 U. S. 337, 339; *Komada* v. *U. S.*, 215 U. S. 392, 396; *U. S.* v. *Falk*, 204 U. S. 143, 152.)

Appellees contend that so construed the Act authorizes the Commission to require information respecting intrastate commerce and manufacture which is beyond the power of Congress to confer. This contention, we believe, has been answered in preceding sections of this brief (supra, pp. 46–52) to the effect that Congress may require any information which will reveal the causes of conditions existing in interstate commerce and which may show whether that commerce is being artificially burdened (supra, pp. 52–55). If we be correct in that contention, then the statute should be construed as authorizing the Commission to require any information, in the field committed to it, which may be of assistance to Congress. In construing the Act to Regulate Commerce this court has repeatedly held that it confers upon the Commission authority to deal with and remove discriminations against interstate commerce arising out of intrastate rates, although there is an express provision that the Act does not apply to carriage wholly within a state. On this point this court said in the *Shreveport Rate Case, supra*.

> We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was "wholly within one State." These words of the proviso have appropriate reference to exclusively intrastate traffic, separately con-

sidered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation.

4. The Call for Monthly Reports was Lawful.

The Commission undoubtedly has the power to call for annual and special reports. (Section 6(b), Federal Trade Commission Act, supra, p. 8.)

Certainly the call would be good for the report for January, 1920. A holding that the Commission might not in advance call for a report will simply mean a slight change in the order or the making of an order each month. If the Commission may lawfully require a report for a particular month at the close of the month, or at any time subsequent thereto, the requirement of a report for that month will not be rendered illegal because accompanied by a notice that a similar report will be requested covering certain succeeding months.

A notice could properly be given that a demand would be made for the report at the proper time. This notice would render it possible for the corporations to prepare in advance to make the report, if they anticipated doing so without protest, and would thus facilitate the work both of the corporation and of the Commission. It is true that the Commission's letter which accompanied the questionnaires states that "said reports * * * are required monthly, for each month of the calendar year 1920." The use of inapt terms, which in form appear to be a requirement, can not convert that which is, in law, a notice to the corporation that a report will be required, into a demand for a report. The Commission, it is contended, is entitled to the report for the month covered by the questionnaire.

Moreover, while the requirement is referred to as a monthly report, the scope of the inquiry obviously brings it within the category of an *investigation* within the meaning of Section 6, Paragraph (a), of the Trade Commission Act, which authorizes the Commission to "investigate, from time to time, the organization, business, conduct, practices, and management of corporations engaged in interstate commerce." Investigations within the scope of this language clearly include inquiries into the current practices and business of a corporation. If the Commission, therefore, determines to investigate and report upon the current practices or business of corporations, and is of opinion that such investigation and report can be made with less annoyance to the corporations,

and less expense to the public, by having the corporation submit the current information, it may properly adopt this method rather than demand practically continuous access to the books and records of the corporations for the purpose of pursuing the investigation.

In other words, the Commission was conducting here an investigation under Section 6 (a) and not merely requiring reports under Section 6 (b).

The Commission is further authorized to make public "from time to time" such parts of the data obtained as it shall deem expedient in the public interest. This clause in itself authorizes, it would seem, the publication of the material at such periods as the Commission might deem most expedient.

VIII.

The Demand for the Information Contained in the Questionnaires in the Manner and Form Made Does Not Violate the Fourth or the Fifth Amendment to the Federal Constitution.

The Fifth Amendment.

The statute authorized the Commission to investigate the conduct, organization, etc., and to require reports from *corporations only*—not natural persons. All of the appellees, as well as all others to whom the questionnaires here involved were addressed, are corporations. Corporations are not entitled to the privilege against self-incrimination found in the Fifth Amendment to the Federal Constitution. (*Wilson* v. *United States*, 221 U. S. 361; *Wheeler* v. *United States*, 226 U. S. 478.)

The appellees have abandoned any claim that the expense of making the reports would be so great as to amount to a deprivation of property without due process of law contrary to the Fifth Amendment. (Stipulations, Rec. pp. 96, 97.) The only other question of deprivation of property under the Fifth Amendment is such as is claimed would flow from the disclosure of information. But this contention is sufficiently met by the allegation in the Commission's answer to the effect that in publishing the information it will not disclose the costs or other information with respect to any individual manufacturer and will otherwise publish only in such form and manner as will conceal rather than disclose the secrets of the business of any particular corporation. (Rec. p. 81.) The framers of the Trade Commission Act evidently contemplated that the duties of the Commission would be such that it would on occasion come into the possession of confidential information or trade secrets, since the statute expressly provides that trade secrets and lists of customers shall not be disclosed. Acquisition by the Government of information confidential in its nature, as an incident of lawful activities, where all officials and other employees are under penalty of heavy fine and imprisonment[1] not to disclose it, is not a deprivation of property in such information. The allegation that disclosure will not be made is to be taken as admitted by the motion to strike.

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[1] Trade Commission Act, Sec. 10.

The Fourth Amendment.

The only remaining contention under this head is that to compel the making of reports would amount to an unreasonable search and seizure prohibited by the Fourth Amendment to the Constitution.

Both the history of this amendment and the decisions of this court indicate rather conclusively that it is applicable only to criminal proceedings. (*Murray* v. *Hoboken Land Co.*, 18 Howard 274, 285; *Boyd* v. *United States*, 106 U. S. 633.) The Trade Commission Act is not criminal or penal save that it makes it an offense to refuse to make reports or to testify in regard to the matters committed to the Commission's jurisdiction. None of the purposes for which the Trade Commission Act authorizes the Commission to procure this information involves any criminal or penal offense. It is authorized to report facts to Congress, make the information public at the discretion of the Commission, make recommendation to Congress for legislation, and to enforce the provisions of Section 5 of the Trade Commission Act and Sections 2, 3, 7, and 8 of the Clayton Act. Violations of the prohibitions of Section 5 of the Trade Commission Act and of the named sections of the Clayton Act do not subject any person or corporation to penalties. The limit of the Commission's power in such cases is to issue an order to cease and desist from the use of the practice. If the Fourth Amendment is to be invoked only in cases or proceedings criminal or penal in their nature, obviously it has no application here.

But if the Fourth Amendment may be invoked in other than criminal proceedings, it is clear that corporations do not enjoy the same immunity under that amendment that natural persons have; and that corporations must submit their books and papers to duly constituted authority when demand is suitably made. Demand is suitably made when a subpœna duces tecum properly specific and limited in its scope is served upon the corporation required to produce books and papers. (*Wilson* v. *United States*, 221 U. S. 361, 382; *Wheeler* v. *United States*, 226 U. S. 478; *Essgee Co.* v. *United States*, 262 U. S. 151.) In the *Wilson case, supra*, this court said, referring to the books and papers of a corporation:

> They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its charter privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably

> made. This is involved in the reservation of the visitorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress.

This passage was quoted with approval and followed by this court in *Essgee Co.* v. *United States*, *supra*.

Reports were required in the instant case by the Commission under express authority of law and within the provisions of the statute and the questionnaires were specific calling for particular classes of trade data. Under the decisions above quoted it is clear that if there was any search involved it was a reasonable search.

In so far as the data were for purposes of ascertaining whether the prohibitions of Section 5 of the Trade Commission Act and of Sections 2, 3, 7, and 8 of the Clayton Act were being violated, the demand was clearly an exercise of the visitorial power of the Federal Government over corporations engaged in interstate commerce. In *Hale* v. *Henkel*, *supra*, this court says that Congress has at least as much visitorial power over the interstate commerce of corporations as the state has over corporations of its own creation. The extent of the demand which may be made for the production and inspection of books and documents under the visitorial power of the states is shown by the decisions of this court in *Consolidated Rendering Co.* v. *Vermont* (207 U. S. 541) and *Hammond Packing Co.* v. *Arkansas* (212 U. S. 322). The requirements of the questionnaires

in the instant case were much less sweeping than the demands in these cases.

Finally, in the cases in which the protection of the Fourth Amendment has been successfully invoked by corporations, and apparently in all cases in which it has been sought to be invoked, demand was made for the production in court or before a grand jury or other tribunal of books, papers, or documents; or books, papers, or documents, or copies thereof surreptitiously seized were sought to be introduced in evidence in such proceedings against the owners thereof. In the instant case the appellees have not been required to produce any books, records, or correspondence or other documents at any place or at any time. Blank forms for reports were sent them calling for certain trade data which they were required to fill out and return to the Commission and to furnish, in addition thereto, balance sheets showing the results of their operations. The case of *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission* (221 U. S. 612) furnishes a striking analogy to the case at bar. There the Commission had required railroads subject to the provisions of the Act to Regulate Commerce to make monthly reports, under oath, showing all instances where employees, subject to the Act, had been on duty longer than 16 consecutive hours. The Hours of Service Act made it an offense, punishable by fine, for a railroad to permit any employee engaged in the transportation of persons or property in interstate commerce to remain on duty for a longer period than this except under emergency condi-

tions. It was contended by the railroad companies that to compel the disclosure called for by these reports would violate the Fourth Amendment. This court, speaking through Mr. Justice Hughes, said:

> The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.

If, as held in that case, compelling the disclosure of information which may subject the corporation disclosing it to penalties be not in violation of the unreasonable search and seizure clause, a fortiori, compelling the disclosure in the instant case of data which are for the information of Congress, and for publication, and which, so far as the laws which the Commission is charged with enforcing are concerned, could not subject the parties to any penalties or forfeitures, does not violate this clause of the Fourth Amendment.

CONCLUSION.

The judgment of the Court of Appeals of the District of Columbia should be reversed and the case remanded with instructions to dismiss the bill and dissolve the injunction.

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APPENDIX A.

[House Report No. 533, Sixty-third Congress, Second Session.]

INTERSTATE TRADE COMMISSION.

April 14, 1914, committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Covington, from the Committee on Interstate and Foreign Commerce, submitted the following report (to accompany H. R. 15613):

1.[1] The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 15613) to create an interstate trade commission, to define its powers and duties, and for other purposes, having considered the same submits this report thereon.

2. The committee begs leave to report to the House that it has had under consideration a number of bills relating to the subject of the establishment of an interstate trade commission. It was announced when the hearings began before the committee upon this proposed legislation that the whole matter of the creation of an interstate trade commission would be considered, including any substitute bills which might be proposed or any suggested amendments to the pending bills.

3. These hearings have been very full and have concerned the varying aspects of the legislation as

[1] The paragraph numbers in this report have been inserted by counsel for convenience in references.

they appeared to business and professional men of large experience. The committee has also had available the elaborate hearings upon the subject before the Senate Committee on Interstate Commerce in 1911–12.

4. After the hearings were closed a subcommittee was named to consider the proper scope of the proposed legislation. It has labored unremittingly for some time to work out the problems involved and to present a bill adequate to meet the sentiment and requirements of the people respecting an independent administrative bureau of the Government to be concerned with industrial corporations engaged in interstate commerce. The completed work of the subcommittee was carefully considered by the full committee, and as a result all the bills originally introduced and referring to the subject of an interstate trade commission have been laid on the table, and the bill H. R. 15613, prepared by the subcommittee, is now reported back to the House with a recommendation that it pass.

5. The bill provides for an interstate trade commission in accordance with the views of the President expressed in his message to Congress in January last on the subject of trusts and monopolies. The recommendation of the President in that message was for the creation of such a commission as an instrument of information and publicity, and as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided. Moreover, he suggested in that message that the commission ought to be made capable of assisting the courts in the shaping of corrective processes. The administration idea, and the idea of business men generally, is for

the preservation of proper competitive conditions in our great interstate commerce. Consequently, the establishment of a commission having powers of regulation or control of prices, or the power directly to issue orders controlling the lawful operations of industrial business in this country, has no place in the bill now reported.

6. Under the act of February 14, 1903, the Bureau of Corporations was created as a bureau of the newly organized Department of Commerce and Labor. Under that act and its amendments the Commissioner of Corporations was given rather extensive powers to investigate the organization and management of business corporations and to obtain such information as would enable the President to make recommendations to Congress for new legislation. With the creation of the Department of Labor, in 1913, the bureau was one of those placed under the jurisdiction of the Department of Commerce. While the powers, authority, and duties conferred upon the Bureau of Corporations and the Commissioner of Corporations are broad, there was a failure specifically to require the regular gathering of certain most important kinds of information through the medium of annual reports from industrial corporations engaged in interstate commerce. The act also omitted to confer other powers, perhaps not then thought useful, but now believed to be most necessary to assist in effectuating the definite policy and functions for the proposed commission announced by the President in his trust message.

7. The bill as reported provides for a commission of three members, at a salary of $10,000 a year. The proposed commission will largely justify its creation by the method and manner of the performance

of its varied duties by its members. The highly efficient services of men of large capacity will be required, and the salaries of the members of the commission have been placed at a figure which will enable the President to secure that sort of men. In the detailed organization of the commission the provisions of the existing act to regulate commerce (and the amendments thereto) creating the Interstate Commerce Commission are followed wherever practicable.

8. In section 3 the bill transfers to the commission all of the powers, authority, and duties of the Bureau of Corporations and of the Commissioner of Corporations. The broadest powers of that bureau and of the Commissioner of Corporations are embraced in the general provision of the law creating that bureau to investigate the organization, conduct, and management of the business of corporations and to gather information and data to enable the President to make recommendations to Congress for legislation for the regulation of interstate commerce.

9. The Commissioner of Corporations up to this time has not come to an issue in court with any corporation concerning the extent of the powers to be exercised under the very general phraseology of the law creating the Bureau of Corporations. At the same time, in the case of United States *v.* Armour & Co. (142 Fed. Rep. 808), before Judge Humphrey in the United States district court for the northern district of Illinois, the validity of those powers was expressly in issue in a criminal case. It was held that "the primary purpose of the act was legislative, to enable Congress by information secured through the work of officers charged with the execution of that law to pass such remedial legislation as might be

found necessary, and the act must be construed in view of that purpose," and that its provisions were definite expressions of legislative intent and constitutionally enforceable.

10. In view of the judicial determination of the validity of the powers of the Bureau of Corporations and of the Commissioner of Corporations and their broad character, the bill transfers those powers to the commission by specific reference to the existing law.

11. But the great value to the American people of the Interstate Commerce Commission has been largely because of its independent power and authority. The dignity of the proposed commission and the respect in which its performance of its duties will be held by the people will also be largely because of its independent power and authority. Therefore the bill removes entirely from the control of the President and the Secretary of Commerce the investigations conducted and the information acquired by the Commission under the authority heretofore exercised by the Bureau of Corporations or the Commissioner of Corporations. All such investigations may hereafter be made upon the initiative of the commission, within constitutional limitations, and the information obtained may be made public entirely at the discretion of the commission.

12. There has been serious question, however, whether regular annual reports from corporations engaged in interstate commerce could be required under the powers of the Bureau of Corporations. None were contemplated in the law creating that bureau, and there was no compulsory power provided to obtain them.

13. Therefore, in section 9 of the bill, annual reports from the great industrial concerns of the country are provided for, setting forth essential facts connected with the organization, stockholders, financial condition, and general business conduct of those concerns.

14. The testimony before the committee by many men of large business experience was singularly in accord with the idea that these reports will afford one of the surest means of that publicity which will tend to an elevated business standard and a better business stability. All corporations engaged in interstate commerce having a capital of more than $5,000,000 are required to file these reports. But it is not always the large corporation that has an organization or financial condition or a system of practices that requires publicity to bring about lawful methods in its business. It is quite possible that a group of small corporations may be so operated as to cause serious violations of law. The commission is given the power, therefore, to make classifications of corporations having a capital of less than $5,000,000 which shall be required to make the same annual reports that are to be made by the large corporations. This power of classification will relieve the mass of smaller business concerns engaged in interstate commerce from the necessity of making such reports, while it reserves to the commission that discretion which it ought to have to provide for rational publicity of bad practices in interstate commerce without regard to the size of the corporations engaged in those practices.

15. The commission, under this section, may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a

corporation in its annual reports does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary.

16. Compulsory publicity of an abstract of the annual and special report of each corporation is required by the provision of section 17 that such abstract must be included in the published annual report of the commission. The section contains, however, ample safeguards to prevent the disclosure of those necessary trade secrets which are of no value to the public in promoting lawful competitive business, but which when disclosed simply afford an opportunity for injurious use by competitors.

17. In some quarters these annual and special reports seem to be regarded as an unnecessary publicity of the affairs of corporations. It is therefore well to note that both the preliminary and final reports of the industrial commission recommended as the chief measures of reform to check the growth of monopoly greater publicity regarding the operations of corporations and particularly the establishment of some organ of publicity in the Federal Government.

18. The preliminary report of the industrial commission submitted to Congress in 1900 said in part as follows:

"The larger corporations—the so-called trusts—should be required to publish annually a properly audited report showing in reasonable detail their assets and liabilities, with profit and loss, such reports and audit under oath to be subject to Government inspection. The purpose of such publicity is to encourage competition when profits become ex-

cessive, thus protecting consumers against too high prices and to guard the interests of employees by a knowledge of the financial condition of the business in which they are employed."

19. The final report of the Industrial Commission, submitted to Congress in 1902, in volume 19, pages 650–651, said in part as follows:

"That there be created in the Treasury Department a permanent bureau the duties of which shall be to register all State corporations engaged in interstate or foreign commerce; to secure from such corporations all reports needed to enable the Government to levy a franchise tax with certainty and justice, and to collect the same; to make such inspection and examination of the business and accounts of such corporations as will guarantee the completeness and accuracy of the information needed to ascertain whether such corporations are observing the conditions prescribed in the act and to enforce penalties against delinquents; and to collate and publish information regarding such combinations and the industries in which they may be engaged, so as to furnish to the Congress proper information for possible future legislation.

"The publicity secured by the governmental agency should be such as will prevent the deception of the public through secrecy in the organization and management of industrial combinations or through false information. Such agency would also have at its command the best sources of information regarding special privileges or discriminations, of whatever nature, by which industrial combinations secure monopoly or become dangerous to the public welfare. It is probable that the provisions herein recommended will be sufficient to remove most of the

abuses which have arisen in connection with industrial combinations. The remedies suggested may be employed with little or no danger to industrial prosperity and with the certainty of securing information which should enable the Congress to protect the public by further legislation if necessary."

20. The commission will also be required under section 10 of the bill, by the direction of the President, the Attorney General, or either House of Congress, to investigate and report the facts relative to any alleged violation of the antitrust acts, and it may include in its report recommendations for readjustment of business, so that the corporations investigated may operate lawfully.

21. Attorney General Harmon, in reply to a House resolution of January 7, 1896, requesting a report regarding the enforcement of the laws against trusts and conspiracies in restraint of trade, and what further legislation, if any, was needed, in part said:

"If the Department of Justice is expected to conduct investigations of alleged violations of the present law or of the law as it may be amended it must be provided with a liberal appropriation and a force properly selected and organized. * * * But I respectfully submit that the general policy which has hitherto been pursued of confining this department very closely to court work is a wise one, and that the duty of detecting offenses and furnishing evidence thereof should be committed to some other department or bureau."

22. Moreover, the Department of Justice has often found that an agreement for readjustment by an offending corporation accomplishes a better result than the continuance of a prosecution. Heretofore there has been no administrative body to obtain the

information that will assist in attaining such an end, and in connection with this power now conferred the commission has a most desirable independence preserved by giving it the entire control of its report to be made after such investigation. There can thus be no laxity at the Department of Justice when it is presented with the facts disclosing violations of law.

23. Broad as are the powers of the Bureau of Corporations, the Commissioner of Corporations in his report of 1904 (p. 14) defines the limit of those powers. He says:

"He can not make investigations or procure or furnish information by means of his compulsory powers for the purpose of enforcing penal provisions other than those contained in the organic act of the bureau."

24. Having regard for the report of Attorney General Harmon, above quoted, the power of investigation conferred upon the commission by section 10 is an extremely important and efficacious one, and one not now exercised by any independent bureau of the Government. That it is a constitutional delegation of power seems certain. By section 3 of Article II of the Constitution it is specifically required of the President that "he shall take care that the laws be faithfully executed." The Attorney General is merely an arm of the Executive, and it was no doubt in consonance with this constitutional provision that Attorney General Harmon wrote the report to Congress above referred to. It is thus certain that the investigations by the commission under this section, by direction of either the President or the Attorney General, will be in the exercise of valid power, delegated to the commission.

25. In so far as the investigations under this section as the result of resolutions of Congress, or either House thereof, are concerned, the commission is authorized to perform a legal and certainly a most beneficent function. Congress, having the constitutional authority to legislate in regard to interstate and foreign commerce, has the power to obtain all the information necessary to make such legislation appropriate and adequate. Its future regulation of industrial corporations engaged in interstate and foreign commerce may be as much determined by information concerning the present practices of corporations in violation of law as otherwise. In its judgment the existing substantive law or procedure of the courts may be ineffective and new remedial legislation may be the solution. In repeated cases the Supreme Court has held that "Congress may not delegate its purely legislative power to a commission," but it has not been held that Congress may not by a commission elicit information in order to lay the foundation for intelligent and effective action in the matter of regulating interstate and foreign commerce.

26. Unthinking criticism has been directed against such power to be conferred on the commission. However, more than 25 years ago Judge Cooley, the distinguished chairman of the Interstate Commerce Commission, said of such power then believed to exist in that commission:

"This is a very important provision, and the commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist and which is not likely to be

brought to its attention on complaint by a private prosecutor."

27. Section 12 confers upon the commission a broad and most useful power as an aid to the courts in suits arising under the antitrust laws. There has been no proper bureau equipped with a trained force to assist the Department of Justice and the courts in solving the difficult economic problems connected with the dissolution of corporations which have been adjudged to be operating in violation of the antitrust laws, and one of the most effective powers conferred upon the interstate trade commission is that contained in the section authorizing the courts to refer to it the matters of the pending suit at the conclusion of the testimony therein to ascertain and report an appropriate form of decree. The purpose of such investigation is to give the court the completest economic information to assist it. This power, of course, does not authorize the commission to gather evidence to be offered in any case considered by the court as the basis of its judgment, and it amply safeguards the constitutional rights of defendants by reserving to them the same right to file exception to the report that now exists in relation to master's reports in equity causes in the Federal courts. The commission, as an independent body of specialists, will, however, have placed upon it the proper burden of framing the plans for the effective segregation and readjustment of unlawful combinations, subject, of course, to the approval of the court.

28. The commission is required, upon its own initiative, by section 13 to see that the execution of any decree against any corporation to prevent or restrain a violation of the antitrust acts is effective. It has been repeatedly said by authorities upon this sub-

ject that there must be some independent and impartial body charged with the duty to see to the continued performance, subject to the direction of the court, of such decrees. The commission is to make investigations whenever necessary for the purpose of enforcing that effective disintegration of a combination in restraint of trade contemplated by the decree of court, and it must transmit to the Attorney General a report showing the manner in which the decree is being carried out, so that application may be made at once to the court for any supplemental order necessary to the proper and continued enforcement of its decree.

29. The power of the Interstate Commerce Commission respecting the compulsory attendance and testimony of witnesses and the production of books and papers has been held in one case to be limited to the quasi judicial duties of the commission to hear complaints against common carriers for violation of the "act to regulate commerce," or to make investigations by the commission upon matters that might have been the object of complaint. (*Harriman* v. *Interstate Commerce Commission*, 211 U. S., p. 243.) In order that the commission may have ample power of subpœna and production of books and papers, the language of section 16 of the bill has been expressly made broad enough to permit a full exercise of that power in connection with any kind of investigation which may be undertaken.

30. In the Industrial Railways case, Interstate Commerce Commission Report No. 4181, an inquiry into allowances by trunk lines to show lines of railroads serving industries, the report says (p. 267):

"These matters were voluntarily brought to our attention by a joint committee of the trunk lines and

the Steel Corporation and were submitted for our consideration on the understanding that the conclusions reached would be accepted both by the carriers and the industries."

31. The powers of investigation conferred upon the commission in the reported bill are certainly broader than are those of the Interstate Commerce Commission, and, considering the specific power under section 10 to include in any report made thereunder "recommendations for readjustment of business in accordance with law," business men may obtain that measure of definite guidance and information which is proper to be given by an administrative body.

32. During the consideration of the bill by the subcommittee there was much discussion as to the extent to which the provision of the Constitution contained in the fifth amendment, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated," might be invoked to protect corporations from an examination of their books and papers. Taking the cases of *Interstate Commerce Commission* v. *Brimson* (154 U. S. 457) and *Hall* v. *Henkel* (201 U. S. 43) as the rule of law, and observing the broad application of that rule in the case of *United States* v. *Armour & Co.* (142 Fed. Rep. 808), there would seem no doubt that there is ample authority for the constitutional exercise of the full powers of investigation conferred upon the commission.

33. The commission has in no sense been empowered to make terms with monopoly or in any way to assume control of business. Such matters are of a most delicate, complex, and doubtful nature, and their advocates seemed all too desirous that the Government should make itself initially responsible

for corporate activities conceived perhaps with such subtlety that the dangers to the public might develop only after sad experience. There has been no attempt to deal with the question of maintenance of fixed prices. The commission has been given no power to pass orders in any way regulating production. It has not been clothed with authority to make a declaration as to the innocuousness of any particular corporation or agreement, even if coupled with the right to revoke such order in the future.

34. All those problems are interwoven with the industrial business of the country in such a way as to be effectively legislated upon, if at all, only after the most exhaustive investigation by trained experts. The hearings before the Senate Committee on Interstate Commerce of a year and a half ago and the hearings before this committee during the pendency of the present bill did not produce any information which would warrant an attempt at an intelligent and sound legislation upon them.

35. It must be remembered that this commission enters a new field of governmental activity. The history of the Interstate Commerce Commission is conclusive evidence that the best legislation regarding many of the problems to come before the interstate trade commission will be produced from time to time as the result of the reports of the commission after exhaustive inquiries and investigations. No one can foretell the extent to which the complex interstate business of a great country like the United States may require, alike for the benefit of the business man and for the protection of the public, new legislation in the form of Federal regulations, but such legislation should come by a sound process of evolution. Even the control of the railways in this

country by the Interstate Commerce Commission affords no complete parallel to administrative control of the industrial corporations of the country by a Federal commission. It is largely the experience of the independent commission itself that will afford Congress the accurate information necessary to give to the country from time to time the additional legislation which may be needed.

36. The whole theory of the creation of the commission has been to make it an efficient and useful independent body, concerned with the maintenance of proper supervisory relations of the Federal Government over industrial corporations engaged in interstate commerce.

37. Those facts which ought to be the common property and the common knowledge of American business men are for the first time to be gathered and controlled as to their publicity by an independent commission. Powers of investigation, safeguarded by proper constitutional limitations, are taken from a now subordinate department under the control of the Executive and given to this nonpartisan body. Where publicity through reports and investigations to promote beneficent legislation are alike ineffective to develop better business practices, the existing administrative machinery of the Federal law is fortified by an independent commission which will perform a work in aid of the courts not now authorized anywhere in the Government.

38. Having regard for the singular success which the Interstate Commerce Commission has had upon the relation of the railroads to the public, independently of the direct power it has exercised to regulate rates and practices, it would seem that the country may rightfully feel that the interstate trade

commission will perform services that will be of inestimable advantage to the business and the future of the country.

Views of the Minority.

The Republican members of the Committee on Interstate and Foreign Commerce desire to separately express their general concurrence in the provisions of H. R. 15613 as reported to the House.

For many years all legislation in this committee has been considered upon its merits, without regard to partisan lines or influences. The subject matter of this bill was recommended to Congress by the President and has been properly made a matter of importance by the present administration. The Republican members on the committee realized the great interest in it by the business organizations and thoughtful citizens interested in the public welfare, as well as its consequence and opportunity for good to the people of the country. Thus its consideration has proceeded with a sincere desire on our part to assist in the preparation of the legislation along the lines which would seem to meet both the public expectations and necessities and yet not be oppressive so as to injure individual effort and initiative.

The majority members of the committee have freely conferred with the members of the minority and have received their cordial cooperation in the formation of this measure. The legislation as reported is such in general as we approve, although individual differences necessarily exist as to the wisdom and scope of some of its provisions and details.

This measure follows substantially the declaration of the last platform of the Republican national convention as follows:

FEDERAL TRADE COMMISSION.

In the enforcement and administration of Federal laws governing interstate commerce and enterprises impressed with a public use engaged therein there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the laws and avoid delays and technicalities incident to court procedure.

In some respects this bill has not the scope outlined in the platform in conferring administrative powers over some classes of business. But we feel that such should be gradually evolved and assumed after more extensive experience and discussion.

The reported measure does not transfer to the commission any function now exercised by the courts but will be of assistance to the courts in the enforcement of the laws regulating commerce.

The measure contains no changes of substantive law as to antitrust matters, because under the rules of the House such legislation is referred to another committee of the House.

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